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**IN THE  
COURT OF APPEALS OF INDIANA**

CONTREL D. PHOENIX,  
Appellant-Defendant,

VS.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 02A03-0610-CR-450

APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Frances C. Gull, Judge  
Cause No. 02D04-0602-FB-32

**April 11, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Control D. Phoenix pled guilty to aggravated battery,<sup>1</sup> a Class B felony, and the trial court imposed a twelve-year sentence. Phoenix appeals, raising two issues that we restate as:

- I. Whether the trial court contravened *Blakely v. Washington*, 542 U.S. 296 (2004) by enhancing Phoenix's sentence using an aggravating circumstance not found by a jury or admitted to by the defendant, i.e., that prior attempts at rehabilitation had failed.
- II. Whether Phoenix's twelve-year sentence was inappropriate based on the nature of his offense and his character.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On February 26, 2006, Phoenix struck Devin Murtaugh in the jaw while the two were being held in the Allen County Jail. The confrontation arose because Phoenix had not been paid the two candy bars Murtaugh owed him as the result of a card game. Phoenix had a cast on his punching hand, and Murtaugh sustained injuries to his jaw that required a steel plate, twelve screws, and his jaw to be wired shut. *Appellee's Br.* at 2. Due to the protracted impairment of the function of Murtaugh's jaw, the State charged Phoenix with aggravated battery. *See* IC 35-42-2-1.5.<sup>2</sup>

On the morning of trial, but after the jury had been selected and instructed as to the law, Phoenix expressed his intention to plead guilty. The trial court held a guilty plea hearing, informed Phoenix of the rights he was waiving by pleading guilty, explained the penalty range for a Class B felony, and accepted Phoenix's plea of guilty without the benefit

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<sup>1</sup> *See* IC 35-42-2-1.5.

<sup>2</sup> IC 35-42-2-1.5 provides in part: "A person who knowingly or intentionally inflicts injury on a person that ... causes ... protracted loss or impairment of the function of a bodily member or organ ... commits aggravated battery, a Class B felony."

of a plea agreement.

At his sentencing hearing, the trial court found Phoenix's criminal history, consisting of one misdemeanor and six felonies, to be an aggravating factor. Elaborating, the trial court noted that Phoenix was convicted in Kentucky in 1992 of theft by unlawful taking, receiving stolen property, intimidating a witness, and first-degree robbery, and was sentenced to twelve years in prison. In June 2005, Phoenix was convicted in Indiana of criminal conversion, and received a "mostly suspended jail sentence with unsupervised probation." *Sentencing Tr.* at 11. About a year later, Phoenix was convicted of forgery and battery and was serving his time when he committed the instant offense. The trial court noted that efforts at rehabilitation as outlined have failed. The trial court also found "as an additional circumstance in your criminal record that you've got juvenile adjudications for assault and were placed in a juvenile facility in Kentucky." *Id.* As mitigating circumstances, the trial court found: (1) Phoenix's acceptance of responsibility; (2) his remorse; and (3) his diagnosis of bi-polar, anxiety disorder, and mood swings. In sentencing Phoenix to twelve years, the court noted, "the aggravating circumstances of your criminal record and failed efforts at rehabilitation outweighs [sic] the mitigating circumstances of your acceptance of responsibility and remorse and mental health diagnosis." *Id.* at 12. Phoenix now appeals.

## **DISCUSSION AND DECISION**

### **I. Blakely Challenge**

Phoenix first contends that his Sixth Amendment right to trial by jury under *Blakely* was violated when the trial judge used an aggravating circumstance that had not been found

by a jury or admitted to by the defendant to enhance his sentence. *Blakely v. Washington*, 542 U.S. 296 (2004). Phoenix contends that the trial court's conclusion that efforts at rehabilitation have failed was just such an inappropriate aggravator.

In *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase the sentence for a crime above the presumptive sentence assigned by the legislature. *Blakely*, 542 U.S. at 301. On March 9, 2005, in response to *Blakely*, the Indiana Supreme Court announced that the portion of Indiana's sentencing scheme allowing trial courts to enhance sentences based on judicial findings of aggravating circumstances violated the Sixth Amendment's right to trial by jury. *Smylie v. State*, 823 N.E.2d 679, 682, 686 (Ind. 2005).

Effective April 25, 2005, in order to remedy the constitutional infirmities of sentencing that were identified in *Blakely* and *Smylie*, our legislature replaced the presumptive "fixed" term sentencing scheme with the current "advisory" scheme. The amended scheme allows a trial court to impose any lawful sentence within a stated range for the class of crime, "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." IC 35-38-1-7.1(d). Phoenix both committed the aggravated battery and was sentenced after the enactment of the new statute. Therefore, the trial court had the authority to sentence Phoenix to any sentence in the range without further explanation. Phoenix's challenge to the trial court's sentencing statement presents no issue for our review. See *McDonald v. State*, 861 N.E.2d 1255, 1259 (Ind. Ct. App. 2007).

## **II. Inappropriateness of the Sentence**

Phoenix next contends, “there was an irregularity in the sentence.” *Appellant’s Br.* at 7. This Court has the authority to revise a sentence authorized by statute “if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B). Specifically, Phoenix urges us to carefully consider the fifteen year lapse between this crime and some of his earlier crimes and that his remorse and mental health are considerations in his favor.

Turning first to the nature of the offense, we note that Phoenix was already in jail for crimes he had previously committed when he committed the present offense. Phoenix was playing cards with a fellow inmate, Murtaugh, and won two candy bars. Upset that Murtaugh had not paid him the candy bars owed, Phoenix, using a hand he knew was covered in a hard cast, struck Murtaugh in the face. Murtaugh sustained extensive injuries, which required a steel plate, twelve screws, and that his jaw be wired shut.

As to the nature of Phoenix’s character, we note that his criminal history includes one misdemeanor and six felonies. In Kentucky, Phoenix was convicted of theft by unlawful taking, receiving stolen property, intimidating a witness, and first-degree robbery. Phoenix served twelve years in the Kentucky Department of Correction, so it is not surprising that a significant amount of time has passed since some of his earlier crimes. Approximately one year after Phoenix was released from Kentucky, he was convicted in Indiana of criminal conversion and received a “mostly suspended jail sentence with unsupervised probation.” *Sentencing Tr.* at 11. One year after that, Phoenix was convicted of forgery and battery and was serving his time on these convictions when he committed the instant offense.

We are mindful of Phoenix's history of mental illness, and it is apparent from a review of the record before us that the trial court was also mindful of that factor. Given the nature of the offense and Phoenix's character, we cannot conclude that the trial court's imposition of a twelve-year sentence, which is just two years more than the advisory sentence, was inappropriate.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.